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JAMES H. McKENNEY,

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 273.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

J. A. SODERBERG.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANT.

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Supreme Court of the United States.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

J. A. SODERBERG.

Statement.

This is an appeal from the Circuit Court of Appeals of the Ninth Circuit. That court affirmed the decree of the Circuit Court for Washington, the suit having been brought in the latter court by the appellant for an injunction restraining J. A. Soderberg from quarrying and removing granite from a piece of land in the state of Washington.

The jurisdiction of the Circuit Court depended (at least this was one ground on which the jurisdiction was based in the bill of complaint) on a

federal question; the appellant has no patent and bases its title and right on the Northern Pacific grant, viz: the act of Congress of July 2, 1864. Soderberg claims the land under the mineral laws of the United States. The controversy depends solely on the interpretation and effect to be given the railroad grant; the case involves over $5,000.00 (transcript, p. 30): it is therefore within the jurisdiction of this court under the act of 1891.

The question in the case is, whether land containing a granite quarry is "mineral" within the true meaning of the Northern Pacific grant, so as not to pass thereby. If it is "mineral" within the proper interpretation of that grant, the appellant has no title; but if not the appellant must succeed and the decrees below be reversed.

After bill, cross-bill, answers and replication had been filed, the case was tried upon an agreed statement, which shows the facts to be as below (transcript, pp. 24 to 33).

The appellant *Railway* company is the successor in title, by virtue of certain foreclosure proceedings and judicial conveyances, of the Northern Pacific *Railroad* company. Section 3 of the grant to the latter company, act of Congress July 2, 1864, says:

> *And be it further enacted,* that there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions

of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, that the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act. *Provided, further*, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected

> as above provided: *And provided, further*, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, that no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

Sec. 2 contains language to be considered, viz:

> "The right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road materials of earth, stone, timber and so forth, for the construction thereof."

The company complied with the conditions of the act. Prior to March 26, 1884, it surveyed and definitely located its road opposite the land in question, and afterward completed the same. On the 23rd of April, 1884, the president accepted as provided in the act this portion of the road (transcript pp. 28, 29).

At the date of the grant and at the date of such definite location the land in question was public land of the United States to which no claims or rights had attached (transcript pp. 28, 29).

The land is within the *place* limits of the grant (transcript, p. 28).

It is rough and mountainous and its principal value consists in a ledge of granite running through it, which granite is of a good merchantable quality, capable of being quarried and valuable for building stone (transcript p. 30).

Soderberg bases his claim upon entries of this

granite ledge under the mining laws of the United States. His entries were made on or about the 16th day of April, 1897, thirteen years after the appellant's rights (if it had any) had become fixed. It is conceded that, if the land was subject to such entries, his proceedings were valid and regular, though this is not important, the whole question being whether *appellant* had the title—*whether the land is included under the terms of conveyance in the grant.*

Assignment of Error.

The courts below erred in holding that the land was "mineral" and for that reason not embraced in the conveyance made by said act of Congress.

Argument.

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Though sometimes mineral land is spoken of as being *excepted*, the expression is not accurate. The act says, "public land, not mineral." *Mineral land is not within this description.* Unlike land to

which claims have attached (which might pass under the grant were they not excepted), mineral land cannot pass; this whether claims have attached to it or not, and regardless of its proximity to market or commercial value. Therefore if granite ledges, beds of limestone, sandstone or slate, beds of clay or sand are "mineral" within the meaning of the grant, they do not pass. They do not pass though no one claims them under a law of Congress, and though their remoteness and inaccessibility may render it morally certain that they will never be used commercially. This applies to the general rock foundations of the whole country within the grant. If granite and other quarryable rocks are not such mineral as Congress intended, they pass under the grant without regard to their being accessible to transportation lines, and close enough to market to make them valuable for building purposes. And if they are not mineral the company is obliged to accept them. But if they are mineral the company can decline to accept the vast areas of desolate and barren rocks within its grant and take in lieu agricultural lands under the *proviso* of the third section.

The learned Circuit Court of Appeals applied the Century Dictionary definition of mineral, "Any constituent of the earth's crust," etc.; also that of Bainbridge on Mines, "All the substances which now form, or which once formed a part of the solid body of the earth" (transcript p. 55).

Undoubtedly a geologist or chemist speaks of "mineral" meaning whatever is not animal or veg-

etable, that is, all inorganic bodies even to liquids and gases.

But it needs no argument to show that such definitions are unsound, for they destroy the grant. The main constituents of the soil including sand and clay are minerals in the scientific sense.

Evidently some other definition must be applied. Congress used the term mineral in a popular sense. In that sense mineral is what is *mined*. Webster defines a mine as "a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging; distinguished from the pits from which stones only are taken, and which are called quarries." He says under the word quarry, "a place, cover or pit where stones are cut from the earth for building or other purposes. The word mine is generally applied to the pit from which are taken metals and coals." See also Century Dictionary word "mine."

That Congress in this land grant act and in prior laws, as well as in subsequent laws, has used the term "mineral land" as including the metaliferous minerals only, will be made clear by a review of the legislation. In no case are non-metal bearing rocks mentioned as "mineral," and the laws bear evidence that Congress did not intend to include the common rocks of the country when legislating touching minerals.

Miscellaneous land laws.

The first reference in national legislation to the mineral deposits of the country is found in ordinance of May 20th, 1785, for the disposal of land in the "western territory." That ordinance reserved "one-third part of all gold, silver, lead and copper mines, to be sold, or otherwise disposed of, as Congress shall hereafter direct."

April 16, 1800 (2 Stat. 87), Congress authorized the president to collect information relative to the copper mines on the south side of Lake Superior.

By act of March 3, 1807 (2 Stat. 448), Congress provided for the sale of certain lands in the present states of Ohio and Indiana, but provided that lead mines should be reserved for future disposition. By the same act the president was authorized to lease the lead mines. This inaugurated the policy of the United States of leasing mineral lands.

March 26, 1816 (3 Stat. 260), it was enacted that the public lands might be leased under certain conditions, but that no lease should be granted for a lead mine or salt spring without the approval of the president.

In various other acts Congress provided for the sale and disposal of public lands, excepting lead mines and salines. See act approved

June 15, 1809,	(2 Stat. 548).
February 15, 1811,	(2 Stat. 617).
March 3, 1811,	(2 Stat. 662).
May 6, 1812,	(2 Stat. 728).
February 17, 1815,	(3 Stat. 211).
March 5, 1816,	(3 Stat. 256).
March 25, 1816,	(3 Stat. 260).
April 27, 1816,	(3 Stat. 319).
April 29, 1816,	(3 Stat. 332).

March 3, 1829 (4 Stat. 364), Congress conferred authority on the president to sell the reserved lead mines and contiguous land in the state of Missouri.

September 4, 1841 (5 Stat. 453), the first general preemption law was passed granting settlers certain preference rights of purchase to the extent of 160 acres each. Section 10 of this act provided:

"No lands on which are situated any known salines or mines shall be liable to entry under and by virtue of the provisions of this act."

July 11, 1846 (9 Stat. 37), Congress ordered "the reserved lead mines and contiguous lands in the states of Illinois and Arkansas and of Wisconsin and Iowa" to be exposed to sale at a minimum price of $2.50 per acre.

March 1, 1847 (9 Stat. 146), Congress created the Lake Superior land district in the upper peninsula of Michigan, and by section 2 directed that the president should cause such of said lands "as may contain copper, lead or other valuable ores" to be exposed to sale at a minimum price of $5 per acre.

The act of March 3, 1847 (9 Stat. 179), organizing the Chippewa land district in Wisconsin provided like terms for the disposal of mineral land therein.

The act of September 26, 1850 (9 Stat. 472), reduced the price of mineral lands in the two districts last referred to.

September 27, 1850 (9 Stat. 496), Congress passed an act applicable to Oregon, commonly known as the "Donation act," and provided (sec. 14) "that no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act."

February 14, 1853 (10 Stat. 158), Congress amended the Donation act, by authorizing the president to offer at public sale certain lands in Oregon west of the Cascade mountains, "excepting mineral lands."

The act of March 3, 1853 (10 Stat. 244), providing for survey of public lands in California, said that none other than township lines should be surveyed where the lands were mineral, and section 6 subjected all the public lands of the state to the preemption law, with the exception of lands claimed under foreign grant or title, "and the mineral lands." Sections 12 and 13 granted certain lands to the state for public purposes, and from each of these grants mineral lands were excluded.

The act of July 22, 1854 (10 Stat. 308), established the office of surveyor general of New Mexico, Kansas and Nebraska, and granted donations to actual settlers, and provided (sec. 4) that none of its terms should "extend to mineral or school lands, salines," etc.

The Union Pacific grant of July 1, 1862 (12 Stat. 489), provided, "all mineral lands shall be excepted from the operation of this act."

The act of July 2, 1862 (12 Stat. 503), granting lands to the several states for agricultural colleges, provided "that no mineral lands shall be selected or purchased under the provisions of this act."

The act of July 1, 1864 (13 Stat. 343), says "that where any tracts embracing coal beds or coal fields constituting portions of the public domain, and which as 'mines' are excluded from the preemption act of eighteen hundred and forty-one," it shall be lawful for the president to offer such tracts for sale.

There can, we submit, be no doubt that under the preemption law of 1841, and under the grants to states for school, college purposes, and the like, lands containing granite or other rock could be acquired by preemption, or would pass to the state under the act in its favor. Throughout all these acts the term "mineral land" is used as embracing only land capable of being "mined" in the ordinary

and popular sense, and not land capable of being "quarried."

The reservation of "mines" in the preemption law of 1841 was no doubt intended by Congress to be identical with the reservation of "mineral land" in the railroad land grants. No reason has been suggested, and probably cannot be, why the exception in the two cases should differ. The use of the term "mines" in the preemption law was interpreted by the interior department as not excluding stone lands from acquisition under that law. See the case of *Elias Jacob*, 7 Copp's Land Owner, 83, and *Conlin v. Kelly*, 12 L. D. 1. In the preemption law the term "mines" clearly did not bear the definition given by the court below to the term "mineral land," namely, all substances treated of in standard works on mineralogy. The use of the word "salines" shows this, for salt is confessedly a mineral within the scientific definition. But evidently Congress supposed that the term "mines" did not include salt, because salines were specially excepted.

This court treated the exception of mines in the preemption law, and mineral lands from grants both to states and to railroads, as synonymous in *Davis v. Weibbold*, 139 U. S. 507, where the court says:

> "The exceptions of mineral lands from preemption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which

> minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant."

The act of March 3, 1853, extended the preemption laws to California and excepted the "mineral lands." It cannot we think be claimed that the excepting clause of this act had any different meaning from the word "mines" used in the preemption law. Certain grants to the state were also made in this act from which mineral lands were excepted. After the passage of the California act, instructions were issued by the department thereunder (1 Lester's Land Laws, 698, par. 8) in which the term "mineral lands" is construed as "all lands on which are situated any known salines or mines." Thus the exact words of the preemption law constitute the departmental construction of the term "mineral lands" as used in the act of 1853. That construction has remained for almost 50 years.

Railroad Grants.

Considering next the railroad grants passed by Congress, it may be a common impression that all such grants contained an exception of mineral land, but this is far from the fact. Most of them contained no such exception. Examination of them

will demonstrate, *that where the grant extended through a country not supposed to contain the precious metals, the grant contained no exception of mineral, and only those grants contained such exceptions which extended through a country known or supposed to be valuable for the precious metals.*

The following railroad grants contained no exception of mineral lands:

Act of September 20, 1850 (9 Stat. 466), granting lands to Illinois, Mississippi and Alabama.

Act of June 10, 1852 (10 Stat. 8), granting lands to the state of Missouri.

Act of February 9, 1853 (10 Stat. 153), granting lands to Missouri and Arkansas.

Act of May 15, 1856 (11 Stat. 9), granting lands to Iowa.

Act of May 17, 1856 (11 Stat. 15), granting lands to Florida and Alabama.

Act of June 3, 1856 (11 Stat. 17), granting lands to Alabama.

Act of June 3, 1856 (11 Stat. 21), granting lands to the state of Michigan.

Act of June 3, 1856 (11 Stat. 20), granting lands to the state of Wisconsin.

Act of June 3, 1856 (11 Stat. 18), granting lands to the state of Louisiana.

Act of August 11, 1856 (11 Stat. 30), granting lands to the state of Mississippi.

Act of March 3, 1857 (11 Stat. 195), granting lands to the state of Minnesota.

Act of March 3, 1865 (13 Stat. 526), granting lands to the state of Minnesota.

Act of May 12, 1864 (13 Stat. 72), granting lands to the state of Minnesota.

Act of March 3, 1863 (12 Stat. 772), granting lands to the state of Kansas.

Act of May 12, 1864 (13 Stat. 72), granting lands to the state of Iowa.

Act of July 4, 1866 (14 Stat. 87), granting lands to the state of Minnesota.

Act of July 23, 1866 (14 Stat. 210), granting lands to the state of Kansas.

Act of June 3, 1856 (11 Stat. 17), granting lands to the state of Alabama.

Act of June 3, 1856 (11 Stat. 18), granting lands to the state of Louisiana.

Act of August 11, 1856 (11 Stat. 30), granting lands to the states of Mississippi, Alabama and Louisiana.

Act of March 3, 1857 (14 Stat. 83), granting lands to the state of Alabama.

In the acts just cited Congress provided for the construction of 61 railroads, and in none is there found an exception of mineral lands. Among all the grants made by Congress for the construction of railroads, we believe that the following only contain an exception of mineral lands, to-wit:

Act of July 1, 1862 (12 Stat. 489), to the Union and Central Pacific railroad companies, and the act amendatory thereof of July 2, 1864 (13 Stat. 356).

Grant of May 5, 1864 (13 Stat. 66), to the state of Wisconsin for railroads running to Lake Superior.

Grant of May 5, 1864 (13 Stat. 64), to the state of Minnesota for the Lake Superior & Mississippi Railroad company (now St. Paul & Duluth).

Grant of July 2, 1864 (13 Stat. 365), to the Northern Pacific company.

Grant of July 25, 1866 (14 Stat. 239), to the California and Oregon and the Oregon Central companies.

Grant of July 27, 1866 (14 Stat. 292), to the Atlantic & Pacific and the Southern Pacific companies.

Grant of May 4, 1870 (16 Stat. 94), to the Oregon Central company.

Grant of March 3, 1871 (16 Stat. 573), to the Texas Pacific company.

Grant of July 4, 1866 (14 Stat. 83), to the state of Missouri for the St. Louis & Iron Mountain railroad.

Grant of July 13, 1866 (14 Stat. 94), to the Placerville & Sacramento Railroad company in California.

Grant of March 2, 1867 (14 Stat. 548), to the Stockton & Copperopolis Railroad in California.

The reason for the exception of minerals in each of these acts is found in the history of the particular grant in question. As to the Pacific roads a general and sufficient reason existed, which was that all of them were to cross the mountain ranges of the west, known at the time to contain precious metals in great quantities. A large proportion of the grants to all the Pacific roads lay in mountainous country which would prove valuable mainly by its production of precious metals.

The mineral exception in the grant to the state of Wisconsin of May 5, 1864, is explained by the then well known existence of copper mines along the probable line of the road. The existence of vast deposits of copper along the southern shore of Lake Superior was reported by Jonathan Carver, in the latter part of the eighteenth century, in his "Three Years' Travel in America," vol. 1.

The exception of mineral lands from the grant to Minnesota of May 5, 1864, which was only one of a large number of grants to that state, is explained by the Lake Superior & Mississippi road being projected through the iron region tributary

to Lake Superior. During the debate on this bill Senator Doolittle called the attention of the senate to the fact that some of the best iron mines of the world were within 15 miles of Lake Superior. Cong. Rec. First Session, 38th Cong., part 2, p. 965. He also stated that there were copper mines 15 miles south of Lake Superior producing as high a percentage of copper as those of the peninsula of Michigan. After this announcement Senator Harlan (p. 1030) moved to amend the bill by inserting in the first section the words "not mineral," and this amendment was adopted.

The reservation in the grant to Missouri, *supra*, is accounted for by the existence of well known lead mines and of iron in that state, as to which lead mines Congress had already legislated in the act of March 3, 1829 (4 Stat. 364).

The other acts containing a mineral exception are those for railroads in California and Oregon. The acts were passed after the discovery of gold in these states, and at a time when it was known that they were rich in precious metals.

In the grant of July 13, 1866 (14 Stat. 94), for the Placerville road, *supra*, the grant was of land "not containing gold or silver."

In the Stockton & Copperopolis grant of March 2, 1867 (14 Stat. 548), the proviso was "that all lands containing gold or silver or copper be, and the same are hereby, excluded."

In these railroad grants we have the strongest and plainest legislative construction of the term "mineral land." If Congress had supposed for a moment that stone land was "mineral land," no reason is apparent why the exception should not have been incorporated in all the grants. There could be no more conclusive demonstration of what Congress meant, than the fact, that in every grant through a country not supposed to contain the precious metals no mention was made of mineral land, while in every grant through a country known or generally supposed to contain the precious metals mineral lands were excluded.

This applies with especial emphasis to the state of Minnesota. Among the numerous grants made to that state, not one, except the grant of March 5, 1864, for the benefit of the present St. Paul & Duluth road, which penetrated the iron and copper of Lake Superior, contained any reference to mineral land. The remaining portion of the state was not supposed to contain mineral, and so far as is now known it does not.

But when these grants were passed, the remaining portion of Minnesota, as well as the states Wisconsin, Illinois, Indiana, Missouri, Kansas, Arkansas, Alabama, Florida, Louisiana, and the other states mentioned in the acts, contained large and numerous deposits of stone; and it must have been contemplated by Congress that these grants would convey many valuable stone deposits and quarries.

School Grants.

The action of Congress in making grants to the various states for school purposes evidences the same policy. In states not known as mining states when the grants were passed, no exception of mineral lands was made. The following grants contain no such exception:

Ohio—March 3, 1803.....	2 Stat. 225
Indiana—April 19, 1816.....	3 Stat. 289
Illinois—April 18, 1818	3 Stat. 430
Missouri—March 6, 1820	3 Stat. 455
Alabama—March 2, 1819	3 Stat. 489
Michigan—June 23, 1836	5 Stat. 59
Arkansas—June 23, 1836	5 Stat. 58
Wisconsin—August 6, 1846	9 Stat. 56
Minnesota—February 26, 1857..	11 Stat. 166
Kansas—January 29, 1861	12 Stat. 126

It was well known when these grants were passed that all these states contained valuable deposits of stone.

When Congress came to make a grant for school purposes to the state of *California*, it provided that mineral lands should be excepted from the grant (act March 3, 1853, 10 Stat. 244). The same is true of a similar grant to the state of *Colorado* (March 3, 1875, 18 Stat. 474). Is it to be supposed that Congress intended to grant stone lands to the states of Ohio, Indiana, Illinois, Missouri, Alabama, Michigan, Arkansas, Wisconsin, Minnesota

and Kansas, but to reserve stone out of the lands granted to California and Colorado?

This question has been expressly passed upon in *Wheeler v. Smith*, 5 Wash. 704. The school land grant to that state excepted "all mineral land." The court held that this exception did not include lands chiefly valuable for stone upon which no deposits of the precious metals existed.

Whatever conflict may be found in department rulings, one feature of practical construction should be conclusive. Millions of acres have been patented under grants which reserve mineral. The department has required the field notes of surveys to specify the character of the land, and has in many ways and at all times exercised many precautions against issuing under such grants patents for land containing minerals; but there is no evidence, either in laws, or in circulars, or doings of the department, that stone land has not been regarded as passing under every grant we have referred to. To the Northern Pacific alone there have been patented over twenty-four million acres. Much of this land, as well as of the land patented under the other grants, contains stone, or clay, or sand, or other mineral which gives, or may at some time give, more value to the land than its use for agriculture. This

universal understanding and practice is erroneous if the court below is correct. For it is not the filing of a claim which can exclude land under the mineral exception. As before pointed out, mineral does not pass under the grant regardless of claims. What is the result? Not only has the department improperly made us patents for a great and indeterminable amount of land, but something like nineteen million acres remain to be patented; this lies mostly in the unsurveyed mountainous regions of Montana, Idaho and Washington. Will the court lay down a doctrine here which will enable the grantee to refuse the barren granite mountains because they are mineral and claim in lieu agricultural land?

The first general act for the disposition of mineral lands was that of July 26, 1866 (14 Stat. 251). It provided for the sale and disposition of lands containing "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper." It is very plain that in no case could a deposit of building stone be disposed of under the terms of this act. Following, as it did, so closely on the Pacific railroad grants of 1862 and 1864, and the act being applicable for the most part to the general region of country traversed by those grants,

it is well-nigh conclusive that the "mineral" which had been retained out of those grants was the very kind of land to be disposed of under the act of 1866.

The act of 1866 declares "all mineral lands" open for exploration and occupation under the law, and provides for the entry and patenting of rocks bearing gold, silver, cinnabar or copper. What was to be patented under this law is clearly the same as what was open for exploration and occupation, and therefore the term "mineral lands" is defined in this very act as being lands bearing gold, silver, cinnabar or copper. The act clearly did not embrace the ordinary rock formations of the country.

In the instructions of the department it is said (2 Lester, 334):

> "Timber lands on rocky hills and mountains, not known to contain any of the aforesaid minerals, will be designated as 'agricultural,' and if the contrary, as 'mineral'."

Another paragraph of these instructions is this:

> "If it is occupied as a mine, or if a vein of quartz or other rock in place, bearing gold, silver, cinnabar, or copper, has there been traced, it is mineral land; but if it has no existing mine upon it, and no metalliferous vein of quartz or other rock is known to pass through or penetrate the tract, the land is not properly classed as mineral, although, contrary to present indications, gold, silver, cinnabar, or copper may at some future time be discovered upon it."

In 1866 this act was construed by the department (2 Lester 328), where it is said:

> "The testimony shows that no mine of gold, silver, cinnabar, or copper exists upon this land, but a sulphur spring is situated thereon. This office does not regard sulphur springs as saline or mineral, so as to come within the inhibition of the statutes excluding mineral and saline lands from pre-emption entry or scrip location."

The act of 1866 applied only to veins or lodes in place, and this was amended by the act of July 9, 1870 (16 Stat. 217), which provided that "claims usually called 'placers,'" including all forms of deposit, excepting veins of quartz or other rock in place, should be subject to entry and patent under like terms and conditions and on similar proceedings, as in the case of vein or lode claims. "Placer" is a Spanish word allied to the word "plaza" and means a place near a river where gold dust is found. In mining, a place where the superficial detritus is washed for gold or other valuable minerals. (Century Dictionary, also Webster's Dictionary). "Placers are superficial deposits, which occupy the beds of ancient rivers or valleys." *Moxon v. Wilkinson*, 2 Mont., 421. In short, "placer" means soil containing precious metals washed down by the elements from some vein or lode in place. It is little short of absurd to say that a bed or ledge of rock in place not bearing metal and fit only to be quarried for building stone is a "placer."

This court in *United States v. Iron Silver Mining Company*, 128 U. S. 673, defined a "placer," and

described those deposits which could be acquired under the mining laws of the United States, as follows:

> "By the term 'placer claim,' as here used, is meant ground within defined boundaries which contains *mineral* in its earth, sand or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. By 'veins or lodes,' as here used, are meant lines or aggregations of *metal* embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock."

On May 10, 1872 (17 Stat. 90), Congress passed an act providing, "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase * * * under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts." We submit that the term "mineral deposits," and the phrase "according to the local customs or rules of *miners*," indicate that Congress did not intend to make a law for the disposition of stone quarries. The act provides for disposition under and in accordance with local customs and rules of "miners." We apprehend there were no settled local rules and customs of "quarryers," and at least Congress did not intend to include them by the word "miners."

But even if ordinary rock formations may be

taken up as mineral deposits under this act, that would not tend to show that Congress in 1864, in passing the Northern Pacific grant, intended to reserve stone.

Subsequently Congress, on June 3, 1878 (20 Stat. 89), passed an act applicable to stone, which reads:

> "All lands valuable chiefly for stone may be sold on the same terms as timber lands, provided that nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal."

This act, it seems to us, is a conclusive declaration by Congress that the disposal of stone was not intended to be provided for under the acts of 1866, 1870 and 1872. The fact that Congress deemed it necessary to provide in 1878 for the disposal and acquisition by settlers of stone quarries, seems to us conclusive that the previous laws had not covered the subject. *McFadden v. Mountain View Company*, 97 Fed. Rep., 670.

On August 4, 1892 (27 Stat. 348), Congress passed the first and only act authorizing the location of stone under the mining laws. The passage of this act can be explained only on the theory that Congress in 1892 regarded stone as not capable of acquisition under the mining laws previously passed. The passage of the act is a legislative declaration to that effect. *Clark v. Erwin*, 16 L. D. 122, decided 1893; *Hayden v. Jamison*, 16 L. D. 537.

There is considerable conflict in the decisions of the department. In 1883, in case of *W. H. Hooper*, 1 L. D. 571, Secretary Kirkwood held that gypsum could be acquired under the act of 1872 as "a valuable mineral deposit." Secretary Teller in the same year issued a circular extending the mining regulations of October 30, 1881, to valuable deposits of borax, soda, sulphur, alum and asphalt in certain states and territories (1 L. D. 572), and held in the case of *Dobbs Placer Mine* (1 L. D. 578), that kaolin or fire clay was subject to a placer location.

But Secretary Vilas held in *Dunluce Placer Mine*, June 4, 1888 (6 L. D. 761), that a deposit of "brick clay" was not mineral within the mining laws, and not subject to entry as a placer claim.

In 1891, in *Conlin v. Kelly* (12 L. D. 1), it was held that a species of granite called jasper, valuable for building, was not mineral so as to be capable of location under the mining laws. Assistant Secretary Chandler says in that case:

> "Congress seems to have recognized the fact that a stone quarry is not a 'placer mine' and it passed an act June 3, 1878 (20 Stat. 89). providing for timber and stone entries."

To the same effect is *Clark v. Erwin*, 16 L. D.

122, decided in 1893, where Secretary Noble held (a) that land chiefly valuable for building stone is not by that fact excluded from the settlement laws; (b) that prior to the act of August 4, 1892, there was no authority for a placer location on land chiefly valuable for building stone. The same ruling was made by Secretary Smith, *Hayden v. Jamison*, 16 L. D. 537.

In *Gary v. Todd*, 18 L. D. 58, Secretary Smith held that land chiefly valuable for phosphates in Florida could be taken under the mining laws, while in *Jordan v. Mining Company*, 20 L. D. 500, he held that fire clay, valuable for the manufacture of pressed brick, could not be taken under the mining laws.

Perhaps it is not possible to reconcile all these decisions, at least it is not necessary for us to attempt to do so. Whether or not fire clay, borax, soda, sulphur, alum and asphalt were properly held by the interior department to be subjects of claim under the mineral laws, it is apparent from these decisions that the general rule of the department was against granite, or any other ordinary building stone, being capable of acquisition under those laws. Moreover, it is clear from these decisions that lands containing building stone could be acquired under the pre-emption laws, which, as we have shown, excepted "mines."

However, in none of the cases above cited was the interpretation of the term "mineral" in a railroad grant involved. On August 5, 1880, this question was presented with respect to the Southern Pacific grant. It was ruled in the case of *Elias Jacob,* 7 Copp's Land Owner, 83:

> "The act making the grant to the railroad company authorized 'said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth; and only reserved from the otherwise unappropriated land granted, such as was mineral in character.
>
> "I am clearly of the opinion that the act did not except from the grant as mineral such lands as were simply valuable for its deposit of limestone, for such lands under the laws then in force were not subject to disposal as mineral; but, as before stated, were disposed of as agricultural when used for agricultural purposes."

In 1894, in the case of *Tucker v. Florida Ry. & Navigation Co.,* 19 L. D. 414, the question was presented whether the word "mineral," as used in the act of June 22, 1874 (18 Stat. 194), includes phosphate deposits. This act allowed land grant railroads to select public lands "not mineral." The secretary held that phosphate rock was not mineral, saying:

> "It would seem, therefore, that the word mineral is given a limited construction, and

> when this fact is taken into consideration with what has been before stated on the subject of mineral legislation, it would seem that the purpose of the word mineral, as used in the act of June 22, 1874, *supra,* was to except from selection, on account of said act, those lands containing valuable metals, such as gold, silver, cinnabar and copper. The word was not used in its broader sense, for the greater part of the earth contains mineral in some form, the value of which often depends upon its location, or the state or advancement of science which makes known its uses."

The construction of the Southern Pacific grant was again in question in *Union Oil Company,* 23 L. D. 222, where the secretary held that land producing petroleum was not mineral within the meaning of the grant, saying:

> "In my opinion, Congress did not have in contemplation at the time of the passage of the act the reservation of lands containing petroleum under the designation of mineral lands. In my view of the statute, it was only contemplated that lands containing the more precious metals enumerated in section 2320, Revised Statutes, gold, silver, cinnabar, etc., that should be excluded."

The three rulings last referred to are in direct conflict with *Pacific Coast Marble Company v. Northern Pacific Railroad Company,* 25 L. D. 233. Secretary Bliss in that case says:

> "Lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws, are 'mineral lands' within the meaning of that term as used in the exception from

> the grant to the Northern Pacific Company for railroad purposes, and to the state."

In this decision the secretary clearly begs the question. He defines "mineral lands" as "lands containing valuable mineral deposits," leaving the essential word "mineral" totally undefined. The decision relies on the definition of "mineral" adopted by Secretary Kirkwood in the circular of July 15, 1873, viz:

> "That whatever is recognized as a mineral by the standard authorities on the subject, when the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated as coming within the purview of the mining act of 1872."

This definition was adopted with reference to the mining law of 1872. As applied to the Northern Pacific and other railroad grants, it must be, we submit, rejected as an unreasonable and impossible definition, (a) contrary to the intention of Congress as disclosed in the laws we have quoted; (b) contrary to the practical construction on the subject; (c) contrary to what the department had uniformly decided theretofore; (d) a definition impossible of application.

That the definition is not a practical one is, we think, demonstrable. It is clear that every odd section within the place limits of this grant must be mineral or non-mineral, and so fall either within the grant or outside of it *upon the date of definite location.* If on that day granite is not mineral,

it passes under the grant and cannot afterward be taken out of it because some years later, by reason of the construction of railroads, or the building up of cities, the stone becomes commercially available. And if the granite ledge involved in this case, which happens to be today commercially profitable, is not within the grant, all the other granites, sandstones, lime-stones, slates and other rocks which are not commercially useful simply because of location, remoteness from market, difficulties of transportation, etc., are equally excluded from the grant, and the company can select agricultural lands in lieu thereof.

The same is true of all clay, brick, petroleum, sand, for all of these substances are, geologically speaking, mineral. If the court below is correct, where is the line to be drawn? Is it to be held that any bed of sand, or of lime, or of clay, which by reason of new scientific discoveries, or the construction of railroads, or the building up of new industries and markets, becomes commercially available and makes the land containing it more valuable for that use than for purposes of agriculture, is thereby taken out of the grant? Such a rule amounts to making mineral today, because somebody files a mining claim, land which nobody would have claimed or taken for its stone in 1884, when the company's rights attached. Such a rule would introduce an intolerable uncertainty into all titles, especially when it is considered that over nineteen million acres of this grant are still un-

patented and lie in a rocky region still largely unsurveyed.

The rule of the court below is moreover an impossible one because it introduces an element of speculation and opinion into the title of every unpatented acre in the Pacific railroad grants. How is it to be determined whether land is more valuable for its stone, for its lime, for its sand, for its clay, than for agriculture? This is quite generally a pure matter of opinion, on which witnesses and experts disagree.

As this brief is being printed there comes to hand a newspaper report of a decision by Secretary Hitchcock just announced concerning land at Butte, that "lands containing ordinary brick clay cannot be acquired under the mining laws." The department's last two rulings illustrate how impossible it is to draw the line between mineral and not mineral under the rule of the court below. Fire brick clay is as much mineral as building brick clay, yet the department is in the predicament of holding the first within the mining law, the second not. Marble is a finer grade of limestone; where would the department draw the line between different grades of limestone? Jasper, a kind of granite, of reddish color, is not mineral according to the department, but the ledge in this case is, probably because it is gray.

Whatever rule is applied, must be decisive of the question as of the day of the grant. Land which is then non-mineral cannot afterward become mineral because of new discoveries in the sciences, of the

building of new railroads, or the creation of new markets, and whatever rule is applied ought to be of simple and certain application. Under the rule decided by the court below there is no place where a line can be drawn, and every unpatented acre of the earth's crust within the limits of these grants may possibly be taken under the mineral laws. We submit that there is no other safe rule than to say that the term "mineral" in these laws means the precious minerals—those minerals which are usually and commonly spoken of as being "mined" —as excluding those things which are only "quarried," like stone, or "dug," like sand or clay.

There is much internal evidence in the Northern Pacific grant that stone was intended to be conveyed, for section 2 specifically provides that the company may take from public lands adjacent to the road (both odd and even sections) stone, timber, etc., for the construction thereof. "Adjacent to the road" in this connection has been interpreted by many decisions to entitle the company to go many miles from the road, provided it takes the nearest material practically accessible. Therefore under this clause the company might range the entire limit of the grant (odd and even sections) to obtain stone for construction; and this is not con-

sistent with the intention to except stone out of the odd sections granted.

The act expressly grants to the company iron and coal lands. As both are generally more valuable than stone lands, it is inconceivable that Congress intended to exclude stone.

If any doubt can remain about the meaning of the term "mineral land," as contained in the Northern Pacific grant, Congress solved that doubt by legislative construction contained in the sundry civil bill approved July 1, 1898 (30 Stat. 597, 620). This act provided a scheme for the relinquishment by the company of lands in contest between the company and settlers and the selection of an equal area elsewhere. It contained the following proviso:

> "*Provided, further*, that the railroad grantee or its successor in interest * * * shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for *stone*, iron or coal."

If the company did not acquire under its grant lands valuable for stone, why did Congress find it essential to provide that the company need not relinquish such lands under the act of 1898?

We refer to certain other decisions having a bearing on the question:

In 1836, the supreme court of Pennsylvania in the case of *Gibson v. Tyson,* 5 Watts. 34, 41, said:

> "With the bulk of mankind, magnesia is not considered a mineral at all. Nothing is thought by them to be such unless it be of a metallic nature, such as gold, silver, iron, copper, lead, etc."

In *Dunham v. Kirkpatrick,* 101 Pa. St., 36, the legal title to certain land had been conveyed with the reservation "excepting and reserving all the timber suitable for sawing; also all minerals," etc. Subsequently petroleum was discovered on the land and the question arose whether it was embraced in the exception of "all minerals."

The court said:

> "It is true that petroleum is a mineral; no discussion is needed to prove this fact. But salt and other waters, impregnated and combined with mineral substances, are minerals; so are rocks, clays, and sand; anything dug from mines or quarries; in fine, all inorganic substances are classed under the general name of minerals; Bou. L. Dic.; Wor. Dic.; Dana's Geology; Grey's Botany. But if the reservation embraces all these things, it is as extensive as the grant, and therefore void. If, then, anything at all is retained for the vendor, we must,

by some means, limit the meaning of the word 'minerals'."

In *Alford v. Barnum*, 45 Cal., 482, the court, defining mineral lands, says:

> "It must at least be shown that the land contains *metals* in quantities sufficient to render it available and valuable for mining purposes."

In *Morrill v. Dixon*, 15 Nev. 407, the court, referring to the exception of mineral lands from the Southern Pacific grant, quotes this language with approval.

In *Smelting Company v. Kemp*, 104 U. S. 649, the court said:

> "A mining claim is a parcel of land containing *precious metal* in its soil or rock."

In *Overman Sol. M. Co. v. Corcoran*, 15 Nev. 417, the court said:

> "If the findings of the court as to the non-existence of any vein or ledge of *gold, silver, or other metalliferous bearing ores, earth or rock*, is sustained by the evidence, then the second and third points relied upon by appellants need not be considered, *for under the laws of Congress no valid location of a mining claim can be made until a vein or deposit of gold, silver or metalliferous ore or rock in place has been discovered.*"

In *McKeon v. Bisbee*, 9 Cal. 137, the court said:

> "A mining claim is a piece of land supposed to contain in its soil or rock gold or other precious metal."

In *Listowell v. Gibbings*, 9 Irish C. L. Reports, 223, 232, the court says:

> "Minerals mean ordinarily metallic fissile bodies."

Justice Miller, in *Stevens v. Williams*, 1 *McCrary*, 480, says:

> "I gave that instruction, but with the distinct understanding that all this substance between porphyry and limestone that has been explained to you, which contains mineral—I mean which contains *ore*—is rock in place."

In *Stevens v. Gill*, 1 Morrison's Mining Reports, 579, Judge Hallett says:

> "A lead cannot exist without valuable ore."

In *Eureka etc. Co. v. Richmond Mining Co.*, 4 Saw. 302, Mr. Justice Field defines a lode as "metal-bearing rock."

Judge Hillyer, rendering the opinion of the court in *Mount Diablo Mining Co. v. Collison*, 5 Saw. 439, uses the term "metal zone" as equivalent to "mineral zone."

See also *Reynolds v. Iron Silver Mining Co.*, 116 U. S. 695; *Richmond Mining Co. v. Eureka Mining Co.*, 103 U. S. 839; *Jupiter Mining Co. v. Bodie Co.*, 7 Saw. 96.

The particular attention of the court is requested to the case of *Barden v. Northern Pacific Railroad Company*, 154 U. S. 288, 314, in which the court discusses the policy of Congress in regard to excepting mineral from grants for the benefit of railroads and holds that until the issuance of patent

lands within the primary limits of the Northern Pacific grant are subject to exploration for minerals. In this case the court recognizes the distinction which we have pointed out between mines and quarries and between deposits of precious metals and deposits of substances which fall within the strict scientific definition of "mineral." The court said:

> "The granting of lands, either by the government or individuals, with a reservation of certain quarries therein, as of marble, granite, or slate, or of certain mines, as of copper, or lead, or iron found therein, is not an uncommon proceeding, and the knowledge or want of knowledge at the time by the grantee in such cases, of the property reserved in no respect affects the transfer to him of the title to it. No one will affirm that want of such knowledge on the identification of the lands granted, containing the reserved quarries or mines, would vacate the reservation, and we are unable to perceive any more reason from that cause for eliminating the reservation of minerals in the present case from the grant of the government than for eliminating for a like cause the reservation of quarries or mines in the cases supposed."

In the concluding paragraph of its opinion the learned Circuit Court of Appeals says, that if indeed, the reservation of mineral in this grant was understood at the time of its passage not to include granite quarries, Congress nevertheless retained the power subsequently to enlarge the reservation before rights were vested by definite location of the road.

It is true that the act contained a qualified right to alter, amend, or repeal. See section 12, which reads as follows:

> "And be it further enacted, that the better to accomplish the objects of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

This right was one reserved only "to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad," etc. In the next place, the amendment, alteration or repeal was to be one "having due regard to the rights of the Northern Pacific Railroad Company."

We deem it unnecessary to discuss the extent of the *power* of Congress to alter, amend, or repeal the act, because there is no evidence in any legisla-

tion that Congress intended to exercise such power. The first act of Congress which referred to stone was that of July 3, 1878, which provided that stone might be sold on the same terms as timber land. The first act of Congress which treated stone as a mineral capable of being located under the mining laws, usages and customs, was the act of August 4, 1892. This act was passed eight years after the company's rights had attached to the land in question by definite location. By no sort of strained construction can this act or the prior ones be treated as an amendment to the grant. It is too clear for discussion that it never occurred to Congress that it was amending the railroad grants when it passed these laws. The claim of Mr. Soderberg was as we have shown, not instituted until 1896, twelve years after the title of the company became consummate. Unless by the terms of the original grant Congress used the term "mineral" as including granite rock, the decree must be reversed.

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